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In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence discovered pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued.

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OPINIONS BELOW

The opinion of the court of appeals on the interlocutory appeal (J.A. 17-27) is reported at 663 F.2d 411. The opinion of the court of appeals affirming the convictions (J.A. 30-32) is unreported. The opinion of the district court (J.A. 3-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982 (J.A. 30). The petition for a writ of certiorari was filed on August 27, 1982, and was granted on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the district court's grant of petitioners' suppression motion, the United States took an appeal pursuant to 18 U.S.C. 3731. The court of appeals affirmed in part and reversed in part (J.A. 17-27). Petitioners were then tried before a jury in the United States District Court for the Eastern District of New York and were convicted of distributing, possessing with intent to distribute, and conspiring to distribute, cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Segura was sentenced to concurrent terms of 10 years' imprisonment on each count, followed by concurrent 15-year special parole terms on each of the three substantive counts. Petitioner Colon was sentenced to concurrent sentences of eight years' imprisonment followed by a special parole term of 15 years on each of the three substantive counts. The court of appeals affirmed (J.A. 30-32).

1. a. The evidence at the suppression hearing showed that in late January and early February 1981, government agents kept petitioners under close surveillance after receiving a tip that cocaine sales were being negotiated at petitioners' apartment. On January 29, 1981, the agents saw petitioners meet with a man in a bar. When the group departed, the man followed petitioners to their apartment. Petitioners went inside while the man waited in his car. Shortly thereafter, petitioner Segura came outside with a rolled up newspaper under his arm and entered the man's car. Two minutes later, Segura exited the car carrying the newspaper, which was now folded and flat (H. Tr. 81-92). On February 8, Segura again briefly visited the same man. That same day the agents observed Segura meet with a known narcotics violator (H. Tr. 96-98).

The following day, the agents observed Segura drive from his apartment to a motel. Enrique Rivudalla-Vidal joined Segura in his car while it was parked outside the motel, and the two men discussed for about 10 minutes

the possibility of Segura selling Rivudalla one kilogram of cocaine on consignment (H. Tr. 98-100, 150, 342-343). On February 12, 1981, Segura called Rivudalla and agreed to provide Rivudalla with one-half kilogram of cocaine. Segura arranged to deliver the cocaine to Rivudalla at 5:00 p.m. at a Burger King (H. Tr. 150, 342-343). At the appointed hour, petitioners Segura and Colon drove to the restaurant, subject to police surveillance. Within a few minutes, Rivudalla and his fiancee, Esther Parra, also pulled into the Burger King parking lot. Segura met Rivudalla at the restaurant door, and they talked for five or ten minutes. Colon joined the two men and then walked to Rivudalla's car carrying a bulky shoulder bag. She stayed with Parra in the car for a couple of minutes. When she left, Colon closed the zipper on her shoulder bag, which the agents observed was now noticeably thinner. Rivudalla and Parra then left the Burger King (J.A. 4; H. Tr. 101-120, 594-598).

Two agents followed Rivudalla and Parra and stopped the couple for questioning before they entered their apartment. Upon learning that a brown paper bag being carried by Parra contained a glassine bag of white powder (later determined to be cocaine), the agents placed the couple under arrest.[1] Rivudalla agreed to cooperate with the police after being advised of his constitutional rights (H. Tr. 135-148). Rivudalla admitted that he had purchased the cocaine from Segura, and that Colon had delivered the cocaine to Parra at the Burger King. Furthermore, Rivudalla informed the agents that he and Segura had agreed that Segura would call him later that evening to find out whether he had been able to sell the cocaine (J.A. 18; H. Tr. 149-151).

b. Between 6:30 and 7:00 p.m., the agents obtained authorization from an Assistant United States Attorney

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[1] **Rivudalla and Parra were indicted with petitioners. They pleaded guilty to the charges and absconded prior to sentencing.**

to arrest petitioners but were advised that a search warrant probably could not be obtained until the following day. The attorney also advised the agents to secure the premises because of the danger that evidence would be destroyed before the warrant issued (H. Tr. 152-154; 444-445). The agents proceeded to petitioners' apartment and listened at the door, but they heard nothing to indicate that the apartment was occupied. The agents then commenced surveillance of the apartment. At first, they posted themselves at the fire escape at the end of petitioners' hall. Later, they moved outside the building (J.A. 10, 18-19; H. Tr. 363-364, 394-397).

At approximately 11:15 p.m., the agents observed Segura enter the building alone, and they arrested him in the lobby of the building. The agents took Segura upstairs to his apartment, although Segura was reluctant to go, falsely maintaining that it was not his apartment. The agents knocked on the door and entered when a woman, later identified as petitioner Colon, opened the door. In addition to Colon, the agents found three other persons seated in the living room.[2] The agents explained that Segura was under arrest and that they were obtaining a search warrant for the premises. The agents then performed a limited security check of the premises to determine whether any other persons were hiding there. In the course of the security check, the agents discovered in plain view on a bedroom desk a triple beam scale and several jars of lactose, and they also saw numerous small cellophane bags in a closet, but they left these items untouched (J.A. 10-11, 19; H. Tr. 258-259, 364-367, 375-376, 401-406). Colon subsequently was arrested,[3] and petitioners and the other occupants of the

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[2] Two of these persons were charged in the original indictment, but a superseding indictment subsequently was returned that charged only petitioners, Rivudalla, and Parra (see H. Tr. 3).

[3] Incident to this arrest, Colon's handbag was searched before she was allowed to take it with her to headquarters. A loaded

apartment were taken to Drug Enforcement Administration headquarters. Two agents remained in the apartment to secure the premises until the search warrant was obtained (J.A. 11, 19; H. Tr. 156-160, 374-379).

A search warrant application was presented to a magistrate at 5:00 p.m. the next day, and a warrant was issued and executed.[4] The agents discovered nearly three pounds (1250 grams) of cocaine in an attache case, two ounces of cocaine in the pocket of a trench coat, 18 rounds of ammunition for the revolver that had been found in Colon's purse when she was arrested, over $54,000 in cash, and records of narcotics transactions. These items were then seized along with the other evidence that had first been seen in plain view in the course of the security check the previous night (J.A. 11, 19-20; H. Tr. 380-385).

2. Following a hearing, the district court granted petitioners' motion to suppress all the evidence seized from the apartment (J.A. 3-16). The court found that there were no exigent circumstances to justify the warrantless entry into the apartment and hence that the original entry and security check of petitioners' apartment was illegal (J.A. 11-13). The court concluded that the search warrant itself was valid because it rested upon a showing of probable cause arising from information untainted by the illegality (J.A. 13), but, relying heavily on *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), the court held that the evidence seized pursuant to the warrant nonetheless had to be suppressed because of the illegal entry (J.A. 13-16). The

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revolver and more than $2,000 in cash were found (H. Tr. 370-371). Those items were ordered suppressed by the district court as the fruits of an illegal arrest (J.A. 13, 16).

[4] One agent explained that the application was not presented earlier in the day because most of the day was spent processing the arrests and presenting petitioners, Rivudalla, Parra, and the other three occupants of petitioners' apartment to a judicial officer (H. Tr. 161).

court concluded that the evidence would not inevitably have been discovered in the absence of the illegal entry because petitioner Colon might have destroyed it before the warrant could be executed (J.A. 15).

The court of appeals affirmed in part and reversed in part (J.A. 17-27). The court agreed that the warrantless entry was not justified by exigent circumstances (J.A. 21-23), but it held that the evidence discovered pursuant to the valid warrant search was admissible (J.A. 24-26). The court specifically rejected the district court's analysis, explaining that the fact that persons were present in the apartment who might otherwise destroy the evidence was a "prudentially unsound" basis for suppression because it would penalize the officers for the correctness of their belief that persons were present who posed a danger of destruction of the evidence (J.A. 25). The court further held, however, that the evidence discovered in plain view in the course of the initial entry should be suppressed (J.A. 26-27). The court reasoned that suppression of such evidence would deter officers from abusing the security check procedure (J.A. 27). Petitioners were then tried and convicted, and the court of appeals affirmed their convictions (J.A. 30-32).[5]

SUMMARY OF ARGUMENT

The question in this case concerns the application of the exclusionary rule—should evidence discovered pursuant to a valid search warrant be suppressed because of an earlier illegal entry? It has heretofore been well established that evidence is subject to suppression only if

[5] On the second appeal, the court rejected the contention that the search warrant was invalid because of material misrepresentations in the affidavit, holding that this contention was foreclosed by the court's decision on the government's pretrial appeal and that, in any event, the district court had correctly concluded that there were no material misstatements in the affidavit (J.A. 31-32). The court also rejected the contention that the evidence was insufficient (J.A. 32).

it is the "fruit" of an illegality, *i.e.*, if it is discovered through exploitation of the illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). The evidence in question here was not unlawfully seized, nor was the illegal entry or search exploited in order to discover the evidence. Because the evidence was derived from an "independent source," it should not be suppressed.

A. The evidence in question was not illegally seized when the officers entered the apartment and secured the premises. Assuming arguendo that the officers' action in securing the premises can be characterized as a "seizure" of the evidence, which they had not yet discovered, it was not an unreasonable seizure in violation of the Fourth Amendment. The officers undisputedly had probable cause to believe that there was contraband in the apartment. While probable cause alone did not give them the authority, in the absence of a warrant or exigent circumstances, to *enter* the apartment, which would entail a limited search, it did entitle them to preserve the status quo pending the issuance of a warrant by securing or "seizing" the premises. Because seizures in a public place involve no invasion of privacy interests, they generally do not require a warrant (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *United States* v. *Watson*, 423 U.S. 411 (1976)); and this Court has specifically approved the seizure of a container on the basis of probable cause pending the issuance of a warrant authorizing its search. *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979). By the same token, securing premises on the basis of probable cause by stationing officers outside to prevent entry and the removal of its contents until a search warrant is obtained is not an "unreasonable seizure." See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978). In sum, while the entry and security check of petitioners' apartment in the absence of exigent circumstances constituted an illegal *search*, the officers did not effect any illegal seizure; hence, the evidence should

be suppressed only if it was discovered through exploitation of the illegal entry.

B. Evidence is suppressible as a fruit of the poisonous tree if it is discovered through exploitation of an illegality, but it clearly cannot be a fruit if the illegality is not even a "but-for cause" of the discovery of the evidence. See *United States* v. *Crews*, 445 U.S. 463, 471 (1980). Here, the discovery of the evidence did not derive from any information learned during the illegal entry and search. The officers did not discover the evidence in question until they executed the lawful search pursuant to the warrant. The warrant itself was based on probable cause known to the officers before the illegal entry took place, and hence was not tainted by the illegality. In short, the discovery of the evidence pursuant to the search warrant transpired exactly as it would have if the illegal entry had never occurred, and thus the evidence should not be suppressed as a fruit.

The only way in which it can be argued that the illegality was a "but-for cause" of the discovery of the evidence is by speculating that, if the officers had not entered to secure the premises, petitioner Colon would have successfully destroyed the evidence before the warrant was obtained. This analysis, which was the basis for the district court's decision, was correctly rejected by the court of appeals as "prudentially unsound" (J.A. 25). Suspects have no constitutional right to destroy evidence—indeed, it is a criminal offense to do so (see 18 U.S.C. 2232)—and the exclusionary rule should not be invoked to suppress evidence solely on the theory that improper police action may have prevented an individual from destroying the evidence during the time a warrant was being procured.

Moreover, suppression on this basis has elements of logical self-contradiction. An illegal entry can be the but-for cause of the discovery of evidence in this sense *only* if there were persons present in the apartment who

would have removed or destroyed the evidence before a warrant was obtained. But in that case exigent circumstances would exist that would justify a warrantless entry into the apartment to prevent the destruction of evidence. Consequently, there is considerable tension between the two underpinnings of the district court's decision—that exigent circumstances did not justify the entry and that the entry caused the discovery of the evidence because it prevented Colon from destroying it before the warrant issued. Moreover, following the district court's approach would result in a bizarre anomaly. The officers would be penalized for being correct in their assessment of exigent circumstances. The evidence would be suppressed when the officers turned out to be correct and the apartment was in fact occupied by persons who could have destroyed the evidence; on the other hand, the evidence would not be suppressed when the officers mistakenly entered and the apartment was unoccupied, because in that case the entry could not possibly have aided the discovery of the evidence by preventing its destruction.

By the same token, established exclusionary rule principles clearly demonstrate that the evidence in question here cannot be characterized as a fruit. The "connection" between the illegality and the discovery of the evidence is extremely attenuated, and, indeed, it rests on the questionable assumption that, if the police had not entered when they did, Colon would have successfully destroyed all of the evidence before the warrant was obtained without any of the agents stationed outside being alerted. Moreover, the officers' decision, despite their reasonable view that exigent circumstances existed, not to conduct any evidentiary search except pursuant to a search warrant belies any suggestion that they "exploited" the illegality; hence, under the principles of *Wong Sun*, the evidence should not be suppressed as a fruit.

C. Petitioners' apparent contention (Br. 35-48) that the "flagrancy" of the officers' misconduct warrants suppression here wholly apart from whether the evidence

was derived from the misconduct is both theoretically and factually unsound. Because of the harsh consequences of the exclusionary rule, this Court has restricted its application to those situations where its purposes are best served. In particular, the Court has determined that evidence should be suppressed only when it is the fruit of an illegality under the *Wong Sun* test. When the discovery of evidence is causally connected to an illegality, the "flagrancy" of the constitutional violation is one important element of the consequent attenuation inquiry. See *Brown* v. *Illinois*, 422 U.S. 590, 604 (1975). Even in such cases, however, the occurrence of misconduct that could be termed "flagrant" does not completely displace the fruits inquiry, and, a fortiori, it cannot require suppression of evidence derived from a source wholly independent of the illegality.

Nor is suppression necessary here as a general deterrent to flagrant illegal entries to secure premises in other cases. As a practical matter, police officers who are in the process of applying for a warrant have little incentive to make an immediate entry unless they genuinely entertain substantial fears that, unless they act, the evidence will be destroyed before the warrant arrives. Thus, while they may sometimes be mistaken in such instances in their judgment that the circumstances are sufficiently exigent to justify warrantless entries, such improper entries will generally occur only in close cases; there is no investigative benefit to be reaped from a flagrant violation and hence no incentive for the police to commit one. On the other hand, even under the court of appeals' decision, there remain substantial disincentives to such illegal entries, such as civil liability and the suppression of evidence discovered other than pursuant to a warrant.

In any event, the officers' conduct here cannot be characterized as flagrant; indeed, it is open to serious question whether they committed any Fourth Amendment violation at all, and there can be no doubt that any mistake they made cannot be deemed egregious. A war-

rantless entry to prevent the destruction of evidence is permitted if the police have sufficient reason to believe that someone is on the premises who is likely to destroy the evidence before a warrant is obtained. Here, the officers undisputedly had probable cause to believe that there was contraband in petitioners' apartment. Because of the arrests that had occurred, the officers also had reason to fear that any occupants of the apartment would be alerted that something was amiss before the warrant issued; when Segura unexpectedly arrived after 11:00 p.m. alone, the officers had a strong basis to believe that Colon was inside the apartment, thereby materially enhancing the concern that the evidence might be destroyed. While the court of appeals disagreed and held that the facts known to the officers did not give them a sufficient basis to suspect that evidence was in danger of being destroyed, this is plainly a close question of law, and the illegality was based solely on a good faith legal misjudgment by the officers.

The other actions taken by the officers also belie the accusation that they acted in bad faith. They consulted with the United States Attorney's office before arresting petitioners and secured the premises on the advice of that office after being informed that a warrant could not be obtained until the following day. When they did enter the premises, they took only those steps necessary to ensure that evidence would not be destroyed and did not conduct an evidentiary search until the warrant was obtained. In sum, the officers' conduct here provides no basis for departing from the black letter principle that the exclusionary rule should not be applied to suppress evidence that is not obtained by exploitation of a violation of a defendant's rights.

ARGUMENT

EVIDENCE DISCOVERED AND SEIZED WHILE EXECUTING AN UNTAINTED SEARCH WARRANT SHOULD NOT BE SUPPRESSED AS THE PRODUCT OF A FOURTH AMENDMENT VIOLATION BECAUSE OF AN ANTECEDENT ILLEGAL ENTRY

This case concerns the admissibility of evidence discovered and seized in a search of an apartment conducted pursuant to a valid, untainted warrant. It presents a question concerning the proper application of the exclusionary rule—should such evidence be suppressed because, before the warrant was obtained, police officers illegally entered the apartment and secured the premises? [6] Thus, contrary to petitioners' repeated suggestion (Br. 6, 16-17, 28, 37-38, 48), the legality of the officers' conduct itself is not in issue here, and therefore the court of appeals' decision certainly does not "countenance[]" (Br. 24) police activity that threatens the public's right to "live as free men and women, safe in [their] homes from lawless government intrusion" (Br. 37). The question presented is not one of substantive Fourth Amendment law, but rather simply one of *remedy*—whether the policies underlying the exclusionary rule require that evidence discovered during a warrant search should be suppressed even though untainted by the prior illegal entry.

The principles that guide this determination are well established. The exclusionary rule has been viewed as a remedial measure necessary to deter constitutional violations by law enforcement officers by removing the incen-

[6] Both courts below found that the initial, warrantless entry into petitioners' apartment was not justified by exigent circumstances and hence violated the Fourth Amendment. Without conceding the correctness of that determination (see pages 38-40, *infra*), we do not contest it in this Court because of its fact-bound nature; we therefore assume arguendo throughout this brief that the officers' initial entry did violate the Fourth Amendment.

tive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). At the same time, this Court has repeatedly recognized that application of the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, thus allowing culpable defendants to go free. Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

The exclusionary rule generally provides that evidence obtained as the direct result of a violation of a defendant's Fourth Amendment rights should be suppressed. For example, evidence discovered in the course of an illegal search ordinarily should be excluded. See, *e.g.*, *United States* v. *Chadwick*, 433 U.S. 1 (1977). Such evidence is sometimes called "primary evidence" because it is discovered while the Fourth Amendment violation is occurring. See 3 W. LaFave, *Search and Seizure* § 11.4, at 612 (1978). In addition, evidence that is subsequently discovered through exploitation of a prior constitutional violation is subject to suppression as the "fruit of the poisonous tree" (*Nardone* v. *United States*, 308 U.S. 338, 341 (1939)). See, *e.g.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975). In these "derivative evidence" situations, the relevant inquiry is whether the evidence was obtained "'by exploitation of [the prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (citation omitted). Thus, some evidence may be admissible at trial even if a Fourth Amendment violation is the "but-for cause" of its discovery, provided the connection between the illegality and the evidence is sufficiently attenuated.

At a minimum, however, it is clear that suppression is appropriate only if "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). If an

individual has been the victim of a Fourth Amendment violation, evidence nevertheless may be introduced against him if it is obtained from an "independent source" and thus is not the product of the illegality. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). In our view, this basic principle compels affirmance of the decision of the court of appeals, because the evidence first discovered in executing a valid search warrant at petitioners' apartment was not the product of the earlier illegal entry.

A. The Officers' Entry Into Petitioners' Apartment To Secure The Premises Was Not An Illegal Seizure Of All Of Its Contents

Petitioners' principal contention (Br. 22-34) is that the evidence in question,[7] which was first discovered in the course of a valid warrant search based on probable cause known to the officers before they entered petitioners' apartment, was illegally seized at the time of the entry and that such illegal seizure continued until the search warrant was executed. That is so, petitioners argue, because the officers' action prevented anyone from removing any of the contents of the apartment pending the issuance of the warrant (see Br. 24). Therefore, even though the evidence in question was not discovered in the course of or as a direct result of an illegal search, petitioners contend that it must be suppressed as "primary" (Br. 28, 36) illegally *seized* evidence.[8] This con-

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[7] We refer here to the cocaine, cash, and narcotics records that were not discovered until the warrant was executed. See page 5, *supra*. The scale, lactose, and cellophane bags observed by the agents in the course of their initial security check were ordered suppressed by the court of appeals, and their admissibility is not in issue here.

[8] The cases relied on by petitioners for this contention (Br. 36) are completely inapposite; they all concern the suppression of evidence *discovered* and seized in the course of an illegal *search*. Petitioners' contention does find support, however, in Ninth Cir-

tention must fail because there was no illegal seizure here; to the extent the officers' actions prior to the execution of the search warrant constituted a seizure of the evidence at issue, that seizure was justified by probable cause and did not violate the Fourth Amendment.

Assuming that the officers "seized" the evidence in question within the meaning of the Fourth Amendment when

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cuit decisions characterizing a securing of the premises after an illegal entry as an illegal seizure of the evidence within. *United States* v. *Lomas*, 706 F.2d 886, 893-894 (1983); *United States* v. *Allard*, 634 F.2d 1182, 1186-1187 (1980). Even the Ninth Circuit, however, has not taken as extreme a position as petitioners. Petitioners argue (Br. 29-34) that no "fruits" inquiry is appropriate because the evidence was illegally seized, but the Ninth Circuit has recognized the relevance of a "fruits" analysis in suggesting that such "illegally seized" evidence should not be suppressed if the government can show that it would have successfully obtained the evidence notwithstanding the seizure. *United States* v. *Allard*, *supra*, 634 F.2d at 1187.

Other courts of appeals have either expressly or implicitly rejected petitioners' seizure theory in considering the admissibility of evidence seized pursuant to warrant searches of premises that had previously been secured by means of an allegedly illegal entry. See *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Fitzharris*, 633 F.2d 415, 421 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); *United States* v. *Korman*, 614 F.2d 541, 542, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980); *United States* v. *Edwards*, 602 F.2d 458, 469 n.12 (1st Cir. 1979). Petitioners' reliance (Br. 24-25) on *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), is misplaced. The *Griffin* court did not suggest that an illegal seizure had occurred; it held that the evidence *discovered* during an illegal entry was the fruit of an illegal *search*. The New York Court of Appeals has explicitly rejected petitioners' seizure theory. *People* v. *Arnau*, 58 N.Y.2d 27, 444 N.E.2d 13, 17-19, 457 N.Y.S.2d 763, 767-769 (1982); contra, *State* v. *Dorson*, 615 P.2d 740, 744 (Hawaii 1980); *People* v. *Shuey*, 13 Cal.3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (securing premises is "inchoate seizure" before individual contents are "actually seized").

they secured petitioners' apartment,[9] there was nothing illegal about the seizure. Putting aside for the moment the officers' entry into the apartment, which necessarily resulted in a limited *search* (see Part B, *infra*), peti-

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[9] When police officers secure an apartment to prevent removal of its contents, there is some technical sense in which they can be said to have "seized" all the contents of the apartment. It seems clear, however, that police cannot actually "seize" a particular movable object in the ordinary sense of the word when they have not even discovered it yet, and thus it is open to serious question whether the underlying premise of petitioners' contention is correct, *i.e.*, that the evidence in question here was "seized" within the meaning of the Fourth Amendment when the officers secured the premises (see Pet. Br. 24). See, *e.g.*, 1 W. LaFave, *Search and Seizure* § 2.1, at 221 (1978) (citation omitted) (defining "seizure" as the " 'act of physically taking and removing tangible personal property' "); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) ("a seizure contemplates a forcible dispossession of the owner"). While this Court has not had occasion to address the issue directly, its analysis of search and seizure cases reflects the view that the securing of premises does not constitute a Fourth Amendment "seizure" of each of the individual items contained therein. For example, the Court has given detailed consideration to the question of when the police may *seize* evidence found in plain view in the course of executing a search warrant for other evidence, even though the entire area being searched is under the custody and control of the police during the search, and thus presumably, under petitioners' theory, *all* of the contents have already been seized. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Similarly, the Court has characterized the taking of individual items from an automobile as a seizure, even though the occupants had already been arrested and the entire automobile presumably was already within the custody and control of the police. See *Texas* v. *Brown*, *supra*, slip op. 8 (plurality opinion); *Colorado* v. *Bannister*, 449 U.S. 1, 3-4 (1980).

Moreover, acceptance of petitioners' theory would cast doubt on the validity of well-established law enforcement practices that are commonly recognized as constitutional. For example, when executing a search warrant, police officers routinely secure the premises in the sense that they do not allow individuals to walk off with the contents of the premises before the search is completed. Cf. *Michigan* v. *Summers*, 452 U.S. 692 (1981). Similarly, it is often necessary for police to cordon off an area during an investigation, for example, to apprehend a fugitive or to investigate a bomb threat. These procedures result in the immobilization of items contained in the secured premises, most of which obviously are not evidence

tioners' contention that there was an illegal *seizure* here rests on the fact that the officers divested them of control and custody of their possessions by securing the premises and forbidding removal of any of the contents of the apartment. This action, however, did not violate the Fourth Amendment. To the contrary, the officers' decision to secure the premises accords with this Court's prescription for dealing with the situation where the police have probable cause to believe that evidence or contraband is present in a private area, namely, preserving the status quo pending the issuance of a search warrant.

It is not disputed that the police officers had probable cause to believe that contraband would be found in petitioners' apartment at the time they first entered. Quite apart from the results of their extended surveillance of petitioners, the officers had been informed by Rivudalla that petitioners that afternoon had supplied him with half a kilogram of cocaine. Rivudalla also had indicated to the agents that Segura probably possessed more cocaine in his apartment, reporting that he had not bought all the cocaine that Segura offered for sale (J.A. 9-10). Indeed, both courts below upheld the validity of the search warrant based on the information known to the officers before they entered the apartment (J.A. 13, 24), thus recognizing the existence of probable cause at that point.

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of a crime, but it cannot be maintained that these procedures expose the officers to liability for "seizing" those items without probable cause. Indeed, the implication of petitioners' contention is that the specificity requirement of the Fourth Amendment can never be satisfied by a warrant authorizing a seizure of specific items expected to be found in a particular area (see *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 4), because the police necessarily will also "seize" many innocuous items not covered by the warrant in the course of executing the search. By the same token, it is difficult to say here that the officers "seized" the evidence within the meaning of the Fourth Amendment simply because they secured the apartment, when they had not yet even discovered the evidence.

Given the existence of probable cause, we submit that the police were entitled to secure the premises to preserve the status quo, although, of course, they were not entitled to secure it by making an entry unless exigent circumstances existed.

Petitioners correctly state (Br. 23) that the Fourth Amendment protects against both unreasonable searches and unreasonable seizures. They seriously err, however, in asserting (Br. 23) that there is no distinction between searches and seizures with regard to what precautions satisfy the reasonableness standard and, based on that premise, in arguing that the officers unlawfully secured their premises in the absence of a warrant. In fact, there is a sharp distinction between searches and seizures with respect to the necessity for the prophylactic measure of a warrant. Because seizures involve only an interference with an individual's possessory interest, and hence are less intrusive than privacy-invading searches, seizures on the basis of probable cause are generally permitted without a warrant. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion) ("[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."). See also *id.* at 2-3 (Stevens, J., concurring); *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5; *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). Indeed, even the more intrusive seizure of a *person* (*i.e.*, an arrest), may be effected in a public place without a warrant. *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976).[10]

[10] It is true that, in the absence of exigent circumstances, a warrant is necessary to effect an arrest in a home or an entry onto private premises to effect a seizure of property, but that is because of the invasion of privacy involved in the entry into the home (*i.e.*, the search), not because of the intrusiveness of the arrest or seizure itself. See *Payton* v. *New York*, *supra*, 445 U.S. at 587-590; *G.M. Leasing Corp.* v. *United States*, *supra*, 429 U.S. at 354.

It follows from these principles regarding extended or permanent seizures that police may seize property that they have probable cause to believe contains contraband for the limited period necessary to obtain a search warrant. In *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the Court held that a warrant was necessary to *search* on the basis of probable cause a suitcase found in an automobile, but it made clear that there was no such prerequisite to *seizure* of the suitcase; rather, the Court explained that the police acted "commendably" (*id.* at 761) in seizing the suitcase and that the proper course of action for police faced with such a situation would be to seize the suitcase and take it to a magistrate to await the issuance of a warrant. *Id.* at 764 n.13. See also *United States* v. *Place*, *supra*, slip op. 5 n.3; *United States* v. *Chadwick*, *supra*, 433 U.S. at 13 & n.8; *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). Such a seizure of a container is merely a common application of a more general rule that the police may take reasonable measures to prevent the destruction of evidence and preserve the status quo pending issuance of a search warrant. See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 298 (1973) (Marshall, J., concurring) (approving a warrantless search of an arrestee because "there was no way to preserve the status quo while a warrant was sought").[11]

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[11] Indeed, the possible destruction of evidence is such a significant concern that in some situations it may justify a warrantless *search*. For example, the limited search incident to arrest is permitted because of, *inter alia*, the danger of destruction of evidence, even when the police have no particular reason to suspect that the arrestee is concealing any evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). And, of course, if the police have sufficient reason to believe that evidence is in danger of destruction before a search warrant can be secured, exigent circumstances permit a warrantless entry even into a dwelling. See *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *United States* v. *Rubin*, 474 F.2d 262 (3d Cir. 1973).

When, as here, police officers have probable cause to believe that contraband is contained in a dwelling, the same principles apply. As long as they do not invade a privacy interest, the police are entitled to preserve the status quo while they obtain a warrant by securing the premises, and thus arguably "seizing" the dwelling and its contents to prevent the destruction of evidence. Although the Court has never been faced with a specific challenge to an action securing the premises, the Court's opinions reflect the understanding that such a "seizure" is reasonable under the Fourth Amendment. In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), police lawfully entered a house armed with an arrest warrant. After unsuccessfully searching for the individual named in the warrant, several police officers detained the occupants of the house while fellow officers obtained a search warrant. This Court considered and ultimately rejected the contention that statements made by the detainees should be suppressed as the fruits of an illegal detention. *Id.* at 106-110.[12] Significantly, however, the Court never doubted the admissibility of the evidence discovered when the warrant was executed, apparently assuming that the officers were entitled to remain in the house to prevent the destruction of evidence while the warrant was being obtained. Similarly, in *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978), the Court held unconstitutional a warrantless search of an apartment where a homicide had been committed, but it noted approvingly the use of a police guard to prevent the destruction of evidence, suggesting that this precaution should have been taken while the officers obtained a search warrant. See also *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *United States* v. *Ross*, 655 F.2d 1159, 1196 (D.C. Cir. 1981) (Wilkey, J., dissenting), rev'd, 456 U.S. 798 (1982); *United States* v. *Hayes*, 518 F.2d 675, 678 (6th Cir. 1975); 2 W. LaFave, *Search and Seizure* § 6.5, at 451 (1978).

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[12] Under *Michigan* v. *Summers*, *supra*, it would appear that this detention did not violate the Fourth Amendment.

In sum, given the officers' probable cause to believe that there was contraband in petitioners' apartment, it was reasonable under the Fourth Amendment for the officers to take steps to prevent destruction of that evidence by securing the premises. That does not mean that the officers were entitled to enter the apartment and infringe petitioners' privacy interest in their dwelling in the absence of exigent circumstances or some other justification for entering, but it does mean that they were permitted to station themselves in a place where they had a right to be and prevent persons from entering the apartment to destroy evidence until the warrant was issued. To the extent such action is deemed a Fourth Amendment "seizure," it is not unlawful.[13]

In this case, of course, the officers did not simply secure the premises from the *outside*; after Segura's arrest, they entered the apartment and thereafter remained *inside* to secure the premises. This entry, which intruded onto petitioners' privacy interest and thus was a "search," poses a distinct question (discussed in Part B, *infra*) as to whether the entry should result in suppression. But it is important to note that, contrary to petitioners' suggestion (Br. 9, 11, 22-24), the fact that the officers remained inside the apartment after this entry rather than going back outside to secure the premises is irrelevant to whether there was an illegal *seizure*. Petitioners' argument that there was an illegal seizure rests on the officers' "control" of the apartment in the sense that they would not permit removal of its contents until the warrant was issued; this control would have been exercised

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[13] We reiterate that in this case the officers plainly had probable cause to believe that there were narcotics stored in petitioners' apartment, and they were in the process of obtaining a search warrant based on facts already known to them when they secured the premises. Thus, we do not contend that police officers lacking probable cause to search are permitted to secure premises for more than a brief time by limiting entry while they seek additional evidence that would justify issuance of a search warrant. Cf. *United States* v. *Allard*, *supra*, 634 F.2d at 1187.

to the same extent whether the officers remained in the apartment or guarded it from the outside. In other words, while there is a sense in which it could be said that items concealed in a house are constructively "seized" by official action preventing access to the premises, the degree of this seizure is the same whether the premises are secured from outside or from within.

The one federal court whose decisions lend support to petitioners' seizure theory, the Ninth Circuit, has explicitly recognized this fact. In *United States* v. *Lomas*, 706 F.2d 886 (1983), police officers entered a hotel room, stayed inside for 30 seconds to determine that no one was there, and then locked the door when they exited so that no one could enter without the assistance of the hotel management. Relying on its earlier decision in *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980), the court of appeals held that this entry was not justified by exigent circumstances and therefore that evidence later discovered in the hotel room pursuant to a warrant search was subject to suppression as the product of an earlier illegal seizure. The court explained that *Allard* was directed at all "police attempts to maintain the status quo by exercising control over a place while seeking a search warrant." 706 F.2d at 894. Hence, the court stated, "[t]hough the officers here exercised control over a hotel room by locking the door rather than waiting inside and decided to seek a warrant before they entered the room rather than afterward, these differences are not legally significant." *Ibid.*; footnote omitted. As explained above, we strenuously disagree with the *Lomas* court (see *id.* at 894 n.3) and with petitioner that the police are not permitted to take steps to preserve the status quo pending the issuance of a warrant; indeed, the absurd result in *Lomas* highlights the inadequacy of petitioners' position.[14]

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[14] Petitioners contend (Br. 40-44) that the police officers here were not entitled to make use of the "impoundment alternative." It is not clear whether petitioners are focusing on the entry into the apartment or whether they are arguing that the police needed

Accordingly, we maintain that no illegal seizure occurred in this case, and we turn to the question whether the search entailed in the *entry* into the apartment requires suppression of the evidence in question.

B. The Evidence Seized Under The Warrant Is Not Suppressible As The Fruit Of An Illegal Entry

The court of appeals held that exigent circumstances did not justify the officers' warrantless entry into petitioners' apartment because they lacked sufficient reason to fear that evidence would be destroyed before the warrant issued. Therefore, the entry and ensuing security search violated the Fourth Amendment. Because the discovery of the evidence in question here was not a product of this illegality, however, but rather was derived from the independent source of an untainted warrant, we submit that the court of appeals correctly held that the evidence was not a "fruit" of the illegality and hence should not be suppressed.

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a warrant to secure the premises from the *outside*—a contention that we regard as manifestly erroneous. The phrase "impoundment alternative" is apparently taken from the writings of two commentators. See 2 W. LaFave, *supra*, § 6.5(c), at 450; Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1474-1489 (1971). Each of these commentators approves the use of the "impoundment alternative" in limited circumstances. See 2 W. LaFave, *supra*, § 6.5(c), at 454-455; 84 Harv. L. Rev. at 1480-1481. It must be emphasized, however, that these commentators focus on an impoundment effected by *entering* the house and do not suggest that there necessarily should be restrictions on the power of police to secure premises from the *outside* on the basis of probable cause. See 2 W. LaFave, *supra*, § 6.5(c), at 451-452; 84 Harv. L. Rev. at 1478. Indeed, although *Lomas* creates some uncertainty on this point, even the Ninth Circuit has recognized that securing premises from the outside to preserve the status quo pending issuance of a warrant is ordinarily reasonable under the Fourth Amendment. See *United States* v. *Flickinger*, 573 F.2d 1349, 1355-1356, cert. denied, 439 U.S. 836 (1978); *United States* v. *Sherwin*, 572 F.2d 196, 200 (1977).

1. *A Fourth Amendment Violation Requires Suppression of Evidence Only When an Exploitation of the Illegality Causes the Discovery of the Evidence*

From the inception of the exclusionary rule this Court has recognized that not all evidence discovered after the commission of a Fourth Amendment violation is subject to suppression. The sanction of the exclusionary rule, which has the harsh consequence of excluding probative evidence from trial, is imposed only against the "fruit of the poisonous tree"; evidence untainted by the illegality is not a suppressible fruit. As Justice Holmes explained in *Silverthorne Lumber Co.* v. *United States*, *supra*, 251 U.S. at 392:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

See also *United States* v. *Wade*, 388 U.S. 218, 242 (1976); *Nardone* v. *United States*, *supra*, 308 U.S. at 341.

In *Wong Sun*, the Court reiterated that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" 371 U.S. at 487, quoting *Silverthorne Lumber Co.* v. *United States*, *supra*. The Court went on to explain that even evidence derived in some way from a Fourth Amendment violation should not be suppressed unless it was sufficiently tainted by the illegality to be considered "fruit of the poisonous tree." It stated (371 U.S. at 487-488; citation omitted):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have

> come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

See also *Brown* v. *Illinois*, *supra*, 422 U.S. at 599.

It is often difficult to determine whether the discovery of evidence that is traceable to a Fourth Amendment violation is sufficiently attenuated to permit its introduction at trial under *Wong Sun*. But the Court's statements in *Silverthorne Lumber Co.* and *Wong Sun* make clear that the attenuation question arises at all only if the illegality is the "but-for" cause of the discovery of the evidence. The indispensable first step to finding that evidence should be suppressed is a determination that "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, *supra*, 445 U.S. at 471. Thus, in *Crews*, a witness identified the defendant as her assailant based on a photograph taken of him during a concededly illegal detention. That illegality, however, was not a basis for suppressing the witness's in-court identification. That identification was founded on the witness's mental picture of her assailant formed at the time of the crime, and thus it was not a product of the illegal detention.

2. *The Illegal Entry Did Not Cause the Discovery of the Evidence in This Case*

As explained in Part A, *supra*, there was nothing illegal about the officers' acting to secure petitioners' apartment from the outside. What was illegal in the absence of exigent circumstances was the search entailed in the entry and security check of the apartment, which exposed portions of the private interior of the apartment to the view of the officers. The evidence in question here, however, did not derive from this illegal search. As in *Crews*,

"the Fourth Amendment violation * * * yielded nothing of evidentiary value that the police did not already have in their grasp" (445 U.S. at 475 (plurality opinion) (footnote omitted)), *i.e.*, the entry was not a "but-for" cause of the discovery of the evidence.

It is undisputed that the police officers did not discover any of the cocaine, cash, or narcotics records at issue here in the course of their entry and security check of petitioners' apartment, nor did they see anything else that contributed to their subsequent discovery of these items.[15] These items were discovered only when the officers searched the apartment pursuant to a valid warrant based on probable cause; indeed, the officers did not even know for certain of the existence of the evidence in question until it was found during the warrant search. Plainly, this evidence was a product of the lawful warrant search, not the prior unlawful entry and security search.

The warrant search itself, of course, was untainted because, as both courts below recognized (J.A. 13, 24), the underlying affidavit (J.A. 28-29) established probable cause based on the information known to the officers before the illegality occurred. Thus, the source for the warrant and the subsequent discovery of the evidence antedated, and was completely independent of, the illegal entry; therefore the warrant search itself cannot be characterized as a "fruit." See *United States* v. *Crews*, *supra*, 445 U.S. at 471-472.

In sum, the illegal entry was simply irrelevant in the traditional, causal sense to the discovery and seizure of the evidence in question. If the officers had not entered the apartment and conducted a security check, their subsequent actions that resulted in the discovery of the evidence would have been identical. They still would

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[15] As noted above (note 7, *supra*), the agents did discover a scale, lactose, and some cellophane bags when they conducted the security check, but the admissibility of those items into evidence is not in issue in this Court.

have obtained a search warrant, searched petitioners' apartment in the same manner, and discovered the same evidence that they did in the course of the warrant search actually conducted here. Nothing seen during the illegal entry contributed to the discovery of the evidence, and thus finding the initial entry to be an illegal search provides no basis for suppressing that evidence. See *People* v. *Arnau*, 58 N.Y.2d 27, 444 N.E.2d 13, 17, 457 N.Y.S.2d 763, 767 (1982).

3. *The Possibility that the Evidence Would Have Been Destroyed Before the Warrant Issued is Not a Valid Basis for Suppression*

There is one sense in which it can be argued that the evidence in question might not have been discovered but for the illegal entry: if the officers had not entered, but rather secured the premises from the outside, petitioner Colon might have been able to destroy the evidence before the warrant was issued and hence prevent its discovery pursuant to the lawful search. Petitioners do not appear to advance this contention, but the theory was the basis for the district court's conclusion that the evidence should be suppressed. See J.A. 15; see also *United States* v. *Allard*, *supra*, 634 F.2d at 1187. For several reasons, however, the possibility that the entry prevented the destruction of evidence should not be held to convert evidence discovered pursuant to a valid warrant search into a suppressible fruit of an antecedent illegal entry.

The court of appeals correctly rejected the district court's theory as "prudentially unsound" (J.A. 25). The warrant requirement of the Fourth Amendment is not designed to protect an individual's ability to destroy evidence or contraband in the time required to procure a warrant, thereby preventing its discovery. In the words of Judge Traynor, "[s]uspects have no constitutional right to destroy or dispose of evidence," and denying them the ability to do so provides no basis for suppression. *People* v. *Maddox*, 46 Cal.2d 301, 306, 294 P.2d 6,

9, cert. denied, 352 U.S. 858 (1956). Indeed, under 18 U.S.C. 2232, it is a criminal offense for any person "to prevent the seizure or securing" of goods by destroying or removing them before they are lawfully seized by the authorities. See also 18 U.S.C. 1510 (obstruction of justice). Surely, the costly remedy of the exclusionary rule should not be invoked in order to safeguard the ability of individuals to escape responsibility for one crime by destroying evidence of it, committing in the process a second criminal offense.

Moreover, as the court of appeals pointed out (J.A. 25-26), suppression on this basis is self-contradictory. An illegal entry can be the but-for cause of the discovery of evidence in this sense *only* if there were persons present in the apartment who would have removed or destroyed the evidence before a warrant was obtained.[16] But in that case exigent circumstances would in fact exist that would justify an entry into the apartment to prevent the destruction of evidence. Put another way, either (1) the evidence would have been destroyed before the warrant issued if the officers had not entered the apartment, in which case immediate entry was in fact necessary, or (2) the evidence would not have been destroyed before the warrant issued even if the officers had not entered the apartment, in which case the entry in no way was a but-for cause of the discovery of the evidence. Under either assumption, there is no sound

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[16] Thus, it is clear that when police officers illegally enter an apartment and find it *unoccupied*, the entry is not, even under the district court's theory, a but-for cause of the discovery of evidence pursuant to a valid warrant. If no one is in the dwelling, the evidence could not have been destroyed before the warrant search because the officers lawfully could have prevented other persons from entering the premises to destroy evidence. Therefore, the district court's theory does not explain cases such as *United States* v. *Lomas*, *supra*, and *United States* v. *Crozier*, 674 F.2d 1293 (9th Cir. 1982), petition for cert. pending, No. 82-819, where evidence seized pursuant to an untainted warrant search was suppressed because of a prior warrantless entry into unoccupied premises.

justification for suppressing the evidence discovered pursuant to the warrant search as the fruit of an illegal entry.

The district court plainly was guilty of this precise self-contradiction. It first found a Fourth Amendment violation here by concluding that exigent circumstances did not justify the entry because the officers "had no proof that anyone was in the apartment" (J.A. 14). The court then turned around and, without reference to this prior conclusion, held that the evidence was a fruit because petitioner "Colon might well have destroyed the evidence had she not been illegally excluded" from the apartment (J.A. 15).[17] We acknowledge that these two statements are not inevitably inconsistent because, as the court of appeals stated (J.A. 25-26), the officers' entry did not necessarily comport with the Fourth Amendment just because it later turned out that the apartment was occupied. The validity of the officers' determination that exigent circumstances existed turns on an objective appraisal of the facts known to them when they entered the apartment; it should not be vindicated on the basis of hindsight. But, by the same token, the fact that the officers were *correct* in believing that the apartment was occupied, and hence that there were in fact exigent circumstances, cannot be ignored in considering whether the exclusionary rule should apply.

Surely there is a logical problem in recognizing that warrantless entry is generally permitted to prevent the destruction of evidence, yet holding that in a particular case evidence must be suppressed because its destruction

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[17] The officers did have probable cause to arrest Colon, and thus it is odd to say that she was "illegally excluded" from the apartment. The district court apparently was referring to the fact that she was arrested in her apartment without a warrant (see *Payton* v. *New York*, *supra*), although the constitutional infirmity in such an arrest is the invasion of privacy associated with the warrantless entry (or *search*), not the arrest itself, which is justified by probable cause. See page 18, *supra*.

was prevented by an entry that is held illegal only because there was an insufficient basis to suspect that evidence might be destroyed. The anomalousness of the district court's approach is compounded by the fact that, if the apartment is unoccupied when the officers enter, the entry cannot even arguably be said to have aided the discovery of the evidence by preventing its destruction, in which event it is entirely impossible to contend that the evidence is a fruit. See note 16, *supra*. Thus, as the court of appeals noted (J.A. 26), the district court's fruits theory has the bizarre consequence of penalizing the officers for being right. The evidence is suppressed when the officers were correct in their belief that the apartment is occupied and hence the entry was in fact necessary, yet the evidence is admitted when the officers were incorrect in their belief and the apartment was unoccupied. This results in suppression in the very cases, and only those cases, where there were in fact exigent circumstances; if the officers' entry was unjustified, the evidence would be admitted, but if the officers' entry actually prevented individuals from successfully destroying evidence, the district court would have the exclusionary rule applied to suppress the evidence and thereby effectively complete the criminal's thwarted effort.

Even if suppression on this basis were not so self-contradictory, the evidence in question here cannot be characterized as a "fruit" under established attenuation principles. The possibility that the evidence would have been destroyed if the officers had not entered to secure the premises establishes, at most, a tenuous "but-for" connection between the discovery of the evidence and the illegality.[18] It is well established, however, that but-

[18] Indeed, the court of appeals rejected the district court's theory in part because it rests on "wholly speculative assumptions" concerning whether Colon would have destroyed the evidence were it not for the illegal entry—*i.e.*, the court doubted whether there was any "but-for" connection at all. We do not rely on this possibility that the evidence would not have been destroyed as being

for causation is only the starting point of the inquiry whether evidence is a suppressible fruit. The exclusionary rule requires suppression only when the evidence has been discovered by " 'exploitation of the illegality' "; suppression is not appropriate when the connection between the illegality and the evidence is sufficiently attenuated that its discovery is " 'by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun* v. *United States*, *supra*, 371 U.S. at 488 (citation omitted). See also *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 106; *United States* v. *Ceccolini*, 435 U.S. 268, 274-275 (1978).

Under the attenuation test set forth in *Wong Sun*, this is the clearest case imaginable for finding that particular evidence is not a fruit. Even accepting the assumptions that establish such a causal connection (see note 18, *supra*), the connection between the illegality and the discovery of the evidence is indirect and quite attenuated—the possibility that the evidence would have been destroyed but for the illegality. The evidence was actually discovered pursuant to an untainted warrant search, which is plainly a "means sufficiently distinguish-

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fatal to petitioners' claim because, in our view, it *was* quite likely that Colon would have attempted to destroy the evidence before the warrant was obtained and that that likelihood established exigent circumstances that justified the warrantless entry. See pages 38-40, *infra*. We note, however, that the district court's suppression of *all* of the evidence does rest on a dubious speculation. Assuming that Colon did attempt to destroy the evidence inside the apartment before the warrant issued, it is unlikely that she could have completed the task of destroying the large quantity of evidence that existed without creating telltale noises or odors that would have alerted the officers stationed outside and provided them with a justification for entering the apartment to prevent further destruction of the evidence. See J.A. 25. Thus, even if the agents had not entered petitioners' apartment when they did, it is likely that some of the evidence would have remained and been discovered during the warrant search, and therefore it is doubtful that the discovery of every item of evidence can be said to be causally connected to the illegality.

able to be purged of the primary taint" (*Wong Sun* v. *United States*, *supra*, 371 U.S. at 488). By the same token, there is little basis for finding that the evidence was discovered by "exploitation of [the] illegality." *Ibid.* After the entry and limited security check, the officers conducted no search for evidence until a warrant was obtained. The decision to await a search warrant despite their premature and unexpected entry, which they believed to be necessitated by exigent circumstances, is antithetical to the concept of "exploiting" an illegal entry. Compare *Brown* v. *Illinois*, *supra*.

Accordingly, apart from the Ninth Circuit (see *United States* v. *Lomas*, *supra*; *United States* v. *Allard*, *supra*), the courts of appeals generally have held that evidence discovered in the course of an untainted warrant search is admissible despite a prior entry to secure the premises that was not justified by exigent circumstances. See *United States* v. *Perez*, 700 F.2d 1232, 1237-1238 (8th Cir. 1983); *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Kinney*, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981); *United States* v. *Fitzharris*, 633 F.2d 416, 421 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); *United States* v. *Korman*, 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980); *United States* v. *Edwards*, 602 F.2d 458, 469 n.12 (1st Cir. 1979) (dictum); see also *United States* v. *Bosby*, 675 F.2d 1174, 1180-1181 (11th Cir. 1982) (illegal search of briefcase not ground for suppressing documents found in subsequent warrant search of briefcase by another officer); *People* v. *Arnau*, *supra* (N.Y. Ct. App.) (expressly rejecting *Allard*); *People* v. *Barndt*, 199 Colo. 51, 604 P.2d 1173, 1175-1176 (1980); *State* v. *Fenin*, 154 N.J. Super. 282, 287, 381 A.2d 364, 367 (1977).

In short, the discovery of the evidence pursuant to the untainted warrant search here was not a fruit of the illegal entry; rather, it is a classic example of evidence obtained through a source independent of the illegality

that is therefore not subject to suppression. In the words of Judge Sobeloff: "It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully." *Sutton* v. *United States*, 267 F.2d 271, 272 (4th Cir. 1959).

C. The Conduct Of The Police Here Provides No Basis For Applying The Exclusionary Rule To Suppress Evidence That Is Not The Fruit Of An Illegality

Petitioners contend that the officers here were guilty of "flagrant" (Br. 40, 42) and "disgraceful police misconduct" (*id.* at 35-36) and demonstrated a "disgraceful and purposeful disregard * * * of the Fourth Amendment" (*id.* at 37). Petitioners appear to argue that general considerations of deterrence justify suppression of the evidence here even if it is not subject to suppression under traditional exclusionary rule principles. This contention is both theoretically and factually unsound.

a. First, there is no theoretical basis for the contention that the flagrancy of police misconduct in a particular case warrants suppression of evidence not suppressible under ordinary Fourth Amendment principles because not traceable to the misconduct. See generally *United States* v. *Payner*, 447 U.S. 727 (1980). Because of the harsh consequences of applying the exclusionary rule,[19] this Court has restricted its application to those

[19] This Court has adverted many times to the costs of the exclusionary rule. There is a compelling "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). The application of the exclusionary rule in a given case undermines this interest and may allow "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). Moreover, this consequence can give rise to a public perception of unfairness that can have the "effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, *supra*, 428 U.S. at

situations where its purposes—principally the deterrence of police misconduct—are best served. *United States* v. *Calandra*, *supra*, 414 U.S. at 348. The Court has determined that the policies of the exclusionary rule do not warrant suppression when the discovery of the challenged evidence has an independent untainted source or when the connection between the evidence and the illegality has been sufficiently attenuated under the *Wong Sun* test. These principles reflect a general determination that in such situations the incremental deterrent benefits that would flow from suppression do not outweigh the substantial societal costs of suppression. See, *e.g.*, *United States* v. *Ceccolini*, *supra*, 435 U.S. at 275-276. Even where the police misconduct can be termed "flagrant," it is appropriate to adhere to that general determination. This does not reflect a condonation of the police conduct. It simply represents a limitation of the application of the exclusionary rule, in accordance with its underlying policies, to situations where it is an appropriate remedy; the mere fact that an illegality has occurred does not provide a sufficient basis to suppress evidence unconnected to that violation. See *United States* v. *Payner*, *supra*, 447 U.S. at 733-736; see also *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981) (Sixth Amendment) ("[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression").

This is not to say that the flagrancy of police conduct is completely irrelevant in considering the proper application of the exclusionary rule. To the contrary, it is undoubtedly a relevant consideration in certain contexts. For example, in the "fruits" area itself, the flagrancy of the police conduct is recognized as a material factor in the attenuation inquiry, provided there is a causal connection between the illegality and the evi-

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490-491 (footnote omitted). See generally *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 12-13 (White, J., concurring in the judgment).

dence. See *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 109-110; *Brown* v. *Illinois*, *supra*, 422 U.S. at 604.[20] "Flagrancy" is only part of the inquiry, however; it is not alone a basis for suppression. Where, as here, the illegality and the discovery of the evidence are unrelated, established Fourth Amendment principles reject the imposition of the suppression remedy, even if the police action can be characterized as "flagrant."

b. Petitioners also appear to suggest (Br. 40-41) that, regardless of the flagrancy of the officers' conduct in this particular case, suppression is necessary as a general rule in circumstances such as these in order to deter police from entering premises unlawfully in every case in which they are seeking a search warrant. That is, petitioners suggest that unless an illegal warrantless entry is punished in every case by suppression of all after-acquired evidence—even if the discovery of the evidence is not causally connected to the illegality—police officers will be encouraged to commit flagrantly illegal entries while awaiting a warrant on the theory that they have nothing to lose. This concern is unfounded.

First, the assertion that adherence to the independent source doctrine in this context will materially encourage substantial Fourth Amendment violations ignores the practicalities of the situations in which the issue arises. The officers, having decided that probable cause exists and that a warrant should be produced, ordinarily have every reason to expect that their investigation will not be hampered by awaiting the magistrate's action on the warrant application. Accordingly, if they possess little

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[20] Similarly, if the Court were to adopt the so-called "good faith" exception to the exclusionary rule (see *Illinois* v. *Gates*, *supra* (White, J., concurring); *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981))—a question now pending before it (see *United States* v. *Leon*, cert. granted, No. 82-1771 (June 27, 1983)—the flagrancy or "bad faith" of the officers' conduct would be a critical factor in considering the application of the exclusionary rule in a particular case.

or no reason to fear the destruction of evidence or the escape of suspects while awaiting the warrant, they have little incentive to make a pre-warrant entry. Such a course of action would serve only to expose them to the risk of civil liability without materially furthering their law enforcement goals. It is only when they entertain substantial fears that prompt action to secure the premises is necessary that they are likely to "jump the gun." But while they may sometimes be mistaken in such instances in their conclusion that the circumstances are sufficiently exigent to justify a warrantless entry, their improper action will in the nature of things generally occur only when the premature entry results from a marginal miscalculation rather than a gross or flagrant violation.

Moreover, admission of untainted evidence subsequently seized pursuant to a valid search warrant does not eliminate every deterrent to an illegal entry. Even if the court of appeals' decision is affirmed, there remain substantial disincentives to purposeful police entries in the absence of exigent circumstances. The illegal entry itself automatically results in a search, and it can reasonably be argued that items seen in plain view when the officers enter are fruits of the entry. Thus, in this case, several items of evidence were ordered suppressed by the court of appeals because they were first discovered during the initial entry and security check. See J.A. 26-27.[21] In

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[21] Because no cross-petition was filed in this case, the correctness of this aspect of the court of appeals' holding is not before this Court. We note, however, that the holding is open to question. Even if the sighting of the evidence in plain view during the warrantless entry makes the evidence a fruit of that entry, it is also true that the warrant search provides a concurrent "independent source" for its discovery. Moreover, under the "inevitable discovery" doctrine, evidence that is the fruit of an illegality may nevertheless be admitted at trial if it is shown that the evidence would inevitably have been discovered anyway even if the illegality had not occurred. See *Brewer* v. *Williams*, 430 U.S. 387, 406-407 n.12 (1977) (dictum). The courts of appeals have universally

addition, there may be probative evidence suppressed as a fruit in connection with the apprehension of persons inside the premises, such as the revolver and cash seized here from petitioner Colon's purse (see J.A. 13) or statements made by an arrestee. See, *e.g.*, *Taylor* v. *Alabama*, No. 81-5152 (June 23, 1982). See also *Gilbert* v. *California*, 388 U.S. 263, 273-274 (1967) (lineup identification). Moreover, at the time the warrantless entry to secure the premises is made, the police officers do not know for certain that a warrant will actually issue, and thus they are not in a substantially different position from officers in any situation where a warrantless entry is contemplated. See *United States* v. *Apker*, 705 F.2d 293, 307 (8th Cir. 1983). Yet it has never been thought necessary to reject the established "fruits" analysis in order to deter all warrantless entries. Finally, a deliberate violation of the Fourth Amendment exposes the officers to possible civil liability. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

This is not to say that suppression would have *no* incremental deterrent effect on illegal entries, only that, as in other areas of Fourth Amendment law, the limited deterrent benefit is outweighed by the substantial cost of suppression. In short, there is no special reason for excepting this case from the general principle that the

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adopted the inevitable discovery doctrine (see, *e.g.*, *United States* v. *Apker*, 705 F.2d 293, 306-307 (8th Cir. 1983); *United States* v. *Fisher*, 700 F.2d 780, 784 (2d Cir. 1983); *United States* v. *Romero*, 692 F.2d 699, 704 (10th Cir. 1982), and cases cited therein), and its validity is now before this Court (*Williams* v. *Nix*, 700 F.2d 1164 (8th Cir. 1983), cert. granted, No. 82-1651 (May 31, 1983)). Unless the evidence would have been destroyed before the warrant was obtained, which is not a possibility when the premises are unoccupied, evidence seen during a warrantless security check would inevitably have been discovered anyway during the later execution of a search warrant and hence should be admissible under the inevitable discovery doctrine. See *United States* v. *Fitzharris*, *supra*, 633 F.2d at 421; contra, *United States* v. *Griffin*, *supra*.

exclusionary rule does not require suppression of evidence that is not the fruit of an illegality.

c. Even assuming arguendo that petitioners are correct in asserting that suppression of evidence not discovered as the result of an illegal entry might be appropriate if the police acted in bad faith (cf. *Williams* v. *Nix*, 700 F.2d 1164 (8th Cir. 1983), cert. granted, No. 82-1651 (May 31, 1983) (bad faith exception to inevitable discovery doctrine)), the underlying factual premise of their argument in this case is manifestly erroneous. The police officers here simply did not act in bad faith or engage in flagrant misconduct. Indeed, while we have not asked this Court to rule on the fact-bound question whether there were exigent circumstances, in our view it is an extremely close question whether the officers' actions violated the Fourth Amendment at all. At most, they were guilty of committing a good faith mistake in making the difficult on-the-spot determination whether the existing circumstances were sufficiently exigent to justify a warrantless entry to prevent the destruction of evidence.

The court below correctly recognized (see J.A. 21-23) that a warrantless entry and protective sweep to prevent the destruction of evidence is permitted if officers have sufficient reason to believe that someone is on the premises who is likely to destroy the evidence before a search warrant is obtained. See, *e.g.*, *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *United States* v. *Martino*, 664 F.2d 860, 869-870 (2d Cir. 1981), cert. denied, No. 81-6755 (June 28, 1982); *United States* v. *Wiga*, 662 F.2d 1325, 1329-1333 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982). The court held that there were no exigent circumstances here, however, because the officers did not have sufficient reason to believe that the apartment was occupied or that the occupants were about to destroy evidence; but this holding is at least open to question under the facts of this case.

First, there is no doubt that the agents had probable cause to believe that there was evidence in the apartment, as is manifested by the issuance of the search warrant. See page 17, *supra*. Second, they had strong reason to believe that, if the apartment were occupied, the occupants would be alerted that something was wrong and would attempt to destroy the evidence before the warrant was obtained. Rivudalla had told the police that Segura was scheduled to call him that evening at 10:00 p.m. to find out whether he had been able to sell the cocaine (J.A. 18; H. Tr. 151). Rivudalla's failure to be present to receive the scheduled call because of his arrest might well have suggested to the occupants that he had been arrested or at least that something was amiss; by the same token, Segura's arrest and his resulting failure to return to his apartment that night would also have given the occupants of the apartment reason to consider destroying the evidence. See, *e.g.*, *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978).

These facts alone did not establish exigent circumstances because the officers initially had insufficient reason to believe that the apartment was occupied. The officers did not hear any noise coming from the apartment, and, accordingly, they did not enter, but rather established surveillance from the outside. The situation changed, however, when Segura returned to the apartment building alone at 11:15 p.m. and was arrested. At that point, the agents realized that Colon, whom they had assumed was with Segura (see H. Tr. 394), was probably in the apartment (her residence) given the lateness of the hour. The realization that the apartment was probably occupied, coupled with the other information known to the officers, gave rise to a reasonable basis for suspecting that the evidence might be destroyed if entry was postponed until a warrant was obtained the next day.[22] While the court

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[22] Contrary to petitioners' contention (Br. 19-21), therefore, this case is quite different from *Vale* v. *Louisiana*, *supra*, where the Court held a warrantless entry and *evidentiary* search illegal

of appeals considered these factors and held that they did not establish a sufficient degree of suspicion that evidence might be destroyed to justify a warrantless entry, the exigent circumstances question is plainly a close question of law, and the officers' commission of a Fourth Amendment violation, if there was a violation at all, manifestly resulted from a good faith misjudgment in a difficult situation.

The other actions taken by the officers, both before and after the entry, buttress the conclusion that they acted in good faith at all times. First, after Rivudalla's arrest, they contacted the United States Attorney's office to attempt to obtain a search warrant rather than acting on their own initiative. See *United States* v. *Campbell*, *supra*, 581 F.2d at 27 & n.9. When the Assistant United States Attorney informed them that a warrant could not be obtained until the following day,[23] the officers carried out the attorney's instructions to secure the premises from the outside. Only when the situation changed did the officers enter the apartment on the basis of their belief that a substantial danger existed that evidence

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because it was not justified by any exigency. 399 U.S. at 35. That conclusion rested largely on the Court's finding that the search took place after the officers had "satisfied themselves that no one else was in the house." *Id.* at 34.

[23] It is not clear why a greater effort was not made to obtain a search warrant when the officers first sought one, and we do not condone the failure to do so. Given that no warrant was available that night, however, we contend that the police officers acted in good faith at all times and that their conduct, to the extent it violated the Fourth Amendment, cannot be characterized as flagrant misconduct. We note that, subsequent to the events in this case, the United States Attorney circulated an internal memorandum reemphasizing that search warrants should be sought when at all possible, regardless of the hour, in order to avoid the need for warrantless entries to secure premises. (A copy of this memorandum is being lodged with the Court and furnished to counsel.) Accordingly, there is no reason to expect that the failure to attempt to contact a magistrate because of the lateness of the hour will be repeated in future cases.

would be destroyed,[24] and they then took no action beyond that reasonably necessary to preserve the evidence. They limited the privacy intrusion to a security check for the presence of persons (which was proper conduct if there were in fact exigent circumstances) and did not make any evidentiary search until the warrant was issued. Compare *Vale* v. *Louisiana*, 399 U.S. 30 (1970) (warrantless *evidentiary* search).[25] In sum, the officers at no time sought to subvert the warrant process; all their actions were taken with the understanding that no evi-

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[24] Petitioners erroneously assert (Br. 44) that the officers flouted the instructions of both the Assistant United States Attorney and Agent Palumbo in effecting the entry. The officers in fact closely followed the attorney's advice. As petitioners note (*ibid.*), he advised the officers (through Agent Palumbo) to secure the premises from the outside, which they did for almost five hours. The Assistant United States Attorney also advised the officers that they were allowed to enter the premises without a warrant if exigent circumstances arose; specifically, the attorney told Agent Palumbo "if you have reason to believe that there was somebody inside that could dispose of whatever was inside * * * you should go into the premises * * * to secure the premises" (H. Tr. 445). In accordance with these instructions, Agent Palumbo directed several officers to enter the apartment to secure the premises after Segura was arrested (see H. Tr. 155-156).

[25] Petitioners also erroneously claim (Br. 45) that the occupants of the apartment were illegally arrested. It is clear that the officers had probable cause to arrest petitioner Colon. Her arrest was illegal in the sense that the officers should not have entered the apartment to arrest her in the absence of exigent circumstances (*Payton* v. *New York*, *supra*), but this is the same illegality that is the focus of this case. That Colon's arrest was illegal for this reason does not suggest any misconduct on the part of the police officers that is not already inherent in the entry to secure the premises. Petitioners also appear to suggest that the arrests of the other occupants were illegal for lack of probable cause. They point to no finding, however, that there was no probable cause for the arrests; indeed, such an assumption is substantially undermined by the fact that two of the other occupants were indicted. See note 2, *supra*.

dentiary search would be undertaken unless and until the warrant they were in the process of seeking was obtained, and their actions were aimed at facilitating that end.

Petitioners object (Br. 45) that the length of time between the entry and the issuance of the warrant—19 hours—evidences the police officers' bad faith. This is simply not so. While 19 hours might often be an unreasonable length of time to secure premises pending the issuance of a warrant, and this delay perhaps could have been shortened somewhat here, in the circumstances of this case the amount of time consumed before the warrant issued does not indicate any bad faith. Petitioners' objection essentially is that the warrant was not obtained until 6:00 p.m. the following day rather than first thing in the morning. But this delay was occasioned by the fact that the police officers and attorneys involved in the case focused their energies on expediting the initial appearance of petitioners and the other arrestees before a magistrate (see Fed. R. Crim. P. 5(a)) rather than on procuring a warrant as quickly as possible (H. Tr. 161, 449-450). It must be emphasized that petitioners, the two residents of the apartment, both had been arrested and were in custody. The fact that their apartment was secured against entry by them or others therefore did not really affect them, and the delay in getting the warrant did not inconvenience them.[26] Thus, while it would have been incumbent on the officers to procure a warrant as expeditiously as possible if the securing of the premises had the effect of restricting individuals' access to their home, in the circumstances here it was reasonable for the officers to place a higher priority on other duties,

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[26] Accordingly, the assertion (Br. 45) that the delay in obtaining the warrant "prevent[ed] the normal use of the dwelling for an absurdly extended period of time" is simply inaccurate.

such as a speedy judicial appearance, rather than obtaining a warrant as quickly as possible.[27]

Petitioners also object (Br. 47-48) that the affidavit for the search warrant did not include the observations made by the officers during the security check.[28] This objection is mystifying. The function of the magistrate

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[27] Petitioners contend (Br. 45-47) that it was flagrant misconduct for the officers to remain inside to secure the premises after the illegal entry. This objection is misconceived. Given that the officers had already invaded petitioners' privacy by conducting a security check of the apartment and that petitioners were in custody, it made no practical difference whatsoever (except to the officers' comfort) whether the officers proceeded to secure the premises by sitting in the apartment or standing outside the door. Petitioners' reliance (Br. 47) on a quote from Professor LaFave's treatise is misplaced because the " 'more intrusive step' " referred to there is the entry itself (and consequent search) not the act of remaining inside the premises once the entry has already taken place.

Petitioners also object that the officers were free "to rummage around" the premises before the warrant issued, suggesting (Br. 45) that the officers perjured themselves at the suppression hearing. The short answer to this contention is that the record unequivocally demonstrates that the officers did not conduct an evidentiary search except pursuant to the warrant (see H. Tr. 375-385), and the courts below plainly credited the officers' testimony in this regard. More fundamentally, however, petitioners' objection highlights the crucial defect in their position. There is no reason to doubt the officers' testimony that they did not conduct an evidentiary search before the warrant arrived because there would have been no advantage for them in doing so. They expected to receive shortly a warrant authorizing them to conduct such a search lawfully. In the same way that a hypothetical pre-warrant search would not have gained the officers access to any evidence that they could not gain with the warrant, the illegal entry also did not gain them any advantage with respect to the discovery of evidence. That is, the valid warrant was an untainted source for the discovery of the evidence completely independent of the illegal entry.

[28] The actual validity of the warrant is not before this Court because it limited the grant of certiorari to Question 1 presented by the petition (see J.A. 33). Petitioners apparently raise this point as evidence of the "flagrancy" of the officers' misconduct.

is not to assess whether the police correctly determined that exigent circumstances justified a warrantless entry to prevent the destruction of evidence. Rather, the magistrate's function is to make a probable cause determination, and thus he was not misled in any way by the alleged omission. There was no reason for the police to include possibly tainted information in the warrant application, thus creating a ground for challenging the validity of the warrant; rather, they acted prudently and properly in drafting the affidavit to specify the basis for probable cause on which they first determined to seek the search warrant—before the warrantless entry.

In sum, the illegality in this case, to the extent there was a Fourth Amendment violation at all, was the result of a good faith misjudgment by police officers with respect to a difficult legal determination. That illegality did not contribute to the discovery of the evidence in question, which was found during the execution of an untainted warrant search. Accordingly, well-established principles dictate that the policies underlying the exclusionary rule do not justify suppression of the evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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